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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JANKOVICH AND PAUL JANKOVICH, CO-PARTNERS DOING BUSINESS AS CALUMET AVIATION COMPANY, PETITIONERS

v.

INDIANA TOLL ROAD COMMISSION

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States is filing the present memorandum to express its concern over the apparent ruling in this case that the imposition of height limitations on future construction abutting a municipal airport necessarily amounts to a partial "taking" of the land for which "just compensation" must be paid and the corollary that the federal Constitution prohibits an attempt to achieve the objective by zoning. We voice our views because of the broad scope of the ruling, invalidating "as an entirety" the zoning ordinance in suit on the ground that it deprives the landowner of part of "the ordinary usable air space" above his property, albeit the ordinance itself does not

purport to appropriate that air space for public use and "there had not been any actual encroachment" by overflights or otherwise. Our submission does not reach the ultimate question—which the court below did not separately consider—whether (assuming every restriction on "usable air space" does not amount to a "taking") the particular application in suit gives rise to a constitutional duty to pay compensation because, with respect to the respondent, the effect of the ordinance was to zone too close to the ground. Nor, finally, do we consider it appropriate to comment upon the very substantial question whether, since the court below held that the challenged ordinance violated Article 1, § 21, of the Indiana Constitution as well as the Fourteenth Amendment of the federal Constitution, the decision rests upon an independent State ground, depriving this Court of jurisdiction. The interest of the United States is confined to the issue on the merits, and comment by us on the jurisdictional question would be gratuitous.[1]

[1] Inasmuch as it involves a claim of federal preemption, however, it is appropriate that we note our disagreement with petitioner's argument that the State ground of decision was not *adequate* because a State law forbidding airport height-limitation zoning would in any event violate the Supremacy Clause (Pet. Br. 53–56). It may be true, as petitioners argue, that the Federal Airport Act assumes that "local power to zone exists," but the form of assurance completed by the grantee in this respect carefully requires only that it act "[i]nsofar as it is within its power" (Pet. Br. 28). There is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation.

1. *Interest of the United States*

We need not detail here the extent of the government's participation in the financing, regulation and operation of airports. The applicable statutes, regulations and contracts were fully canvassed by this Court in its recent decision in *Griggs* v. *Allegheny County,* 369 U.S. 84. In light of its interest in promoting air transportation, the United States is of course concerned that airports be planned to provide safe approach areas, free of dangerous obstructions for the planes, and, so far as possible, safe and tolerable for the surrounding inhabitants. Indeed, the Federal Aviation Agency prescribes the necessary standards for glide paths in detail and the provisions of the ordinance in suit in this respect conform to the federal regulation. Nor is the government indifferent to the manner in which such safe approaches are created. Because cost is a factor and because zoning offers other advantages, the United States is committed to the view that, within reasonable limits, local authorities should be encouraged to restrict the use of land surrounding airports by appropriate zoning laws, which, of course, include height limitations.

It was to this end that the Federal Aviation Agency, some years ago, promulgated a "Model Airport Zoning Ordinance" which includes appropriate height restrictions for the approach areas (see Appendix F to Brief for Petitioners, pp. 27a–45a). And, in furtherance of that goal, the Agency early this year recommended the enactment of the Federal Airport Act

Amendment (P.L. 88-280, 78 Stat. 158, 161).[1] The Congress shared the same concerns. The Senate Committee to which the proposed legislation was referred discussed the subject at some length in its report and stated (S. Rep. No. 446, 88th Cong., 1st Sess., pp. 22-23):

> The growing seriousness of the aircraft noise problem cannot be ignored or dismissed with the attitude that time will eventually effect a solution. Within reason, every present means to alleviate noise should be employed. The committee is convinced that the single most important means is to insure adequate zoning and that the proposed amendment will contribute to such an effort. * * *
>
> * * * * * *
>
> The Federal Government has a legitimate interest in encouraging appropriate land use in order to protect its investment in airports through the Federal airport program. However, the primary initiative should rest with the local governments, and the Federal Government's approach should be one of cooperation and assistance and not one of preemption or dictation.[2]

---

[1] The communication from the F.A.A. to Congress (H. Rep. No. 1002, 88th Cong., 1st Sess., p. 14) describes the purpose of the measure: "This is intended to more clearly express the Federal Government's concern and intention to assure that land use planning in the vicinity of airports is more fully compatible with aircraft operations."

[2] During the hearings, Mr. Halaby, the F.A.A. Administrator, illustrated the problem by the specific illustration of Dulles Airport as follows:

> Senator MONRONEY. We have a good test case, I think, in Dulles airport, where at a great cost and distance from the city of Washington, the Government sought to get the

The law now requires the federal Administrator, before granting funds for the establishment of airports, to receive written assurance from local authorities that—

> appropriate action, including the adoption of zoning laws, has been or will be taken, to the

---

ideal airport, an airport located far enough from the city so that the city would be insulated against the noise problem. This required a substantial expenditure on access roads to provide rapid ground transportation.

Now what shape are we in actually here at Dulles? I hear rumors and reports that off the end of both runways, there are some developers who have already started housing projects.

Mr. HALABY. Mr. Chairman, the first step, of course, was for the Congress to authorize and fund the purchase of a very large acreage of land, some 10,000 acres. The second was for President Eisenhower and my predecessor, to select a site at some distance from the center of the traveling population. The third was to lay out the airport and to landscape it in such a way that the noise from operations thereon would be reduced as much as possible within this area.

But, that is not entirely adequate and the two counties at the boundaries of this magnificent new airport have a responsibility to their citizens in the future, as well as to their special interests in the present. It appears that one of those counties, despite very strong pleadings by the Federal Aviation Agency to take the long general public interest view rather than the short special interest view, has permitted zoning for housing development under the path of takeoffs and landings on one of the runways.

The other county seems to be taking a long range planning point of view and we are very hopeful that they will zone and develop the area in such a way that it will be quite compatible with safe and efficient use of the airport. Hearings before the Aviation Subcommittee of the Senate Committee on Commerce on S. 1153, to Amend Federal Airport Act, p. 22. Statements at the hearings by others concerning the zoning provision appear at pages 28, 51, 81–85, 95–96, 140.

extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft.

2. *Scope of the ruling below*

As we have said, the United States is concerned because of the breadth of the ruling below, insofar as it is predicated on the federal Constitution. The Indiana Supreme Court did not merely decide that, in the particular circumstances of this case, a prohibition on construction above 18 feet, as applied to the present respondent, amounted to a "taking." Rather, it broadly held that the Fourteenth Amendment bars any attempt to forbid by zoning the use of any portion of the "ordinarily usable air space" above land surrounding an airport and that such a restriction necessarily amounts to a "taking" for which compensation must be paid, even though the taker has in no sense "occupied" the cleared airspace, by flights or otherwise.

As petitioner notes, there is language in the opinion below declaring the Gary airport ordinance "invalid as an entirety" (R. 214) and "wholly void" (R. 217). But we need not rest on these expressions alone. The thrust of the opinion as a whole is that the federal Constitution views as a "taking" for which compensation is due any zoning restriction (at least if imposed for airport purposes) which effectively deprives a landowner of any part of the "ordinarily usable air space" above his property. To be sure (as respondent points out), after announcing general principles,

the decision adverts to the question "whether an unconstitutional taking has resulted in the instant case" (R. 214; also, R. 211). The answer given, however, is wholly unrelated to the particulars of the case. Nothing is said about the character of the land surrounding Gary Airport, much less respondent's tract. Nor does the opinion focus on the effect of the ordinance here to prohibit construction above 18 feet—as opposed to its effect at a greater distance from the airport, or at another point on the boundary of the airport property. Indeed, no distinction is made between the more severe height limitations imposed in the "inner area approach zones" (here involved) and those applicable to other land surrounding the airport (see R. 153–154 and Pl. Exh. 3A, R. 158). For the court below, it was apparently enough that the ordinance purported to deprive neighboring property owners of some part of the "ordinarily usable air space" above their land, which presumably might reach even beyond the 150-foot ceiling imposed on all land use within 2 miles of the runways (see R. 153–154).

Nor is the ruling below narrowed by the finding that, through the airport zoning ordinance, the City has attempted to "appropriate" the cleared airspace "to its own use" (R. 214). There may be an implication here that the Indiana court views height limitations enacted for airport purposes differently from similar restrictions in a more comprehensive zoning law, presumably because the former are thought to serve a less general public purpose, being for the special benefit of the airport and its users. But there

is no suggestion that the City or its permittees have reduced the "appropriated" airspace to their own possession or otherwise occupied it. Nor could there be. The "taking" is said to have been attempted "by the passage of the ordinance," before any invasion of the disputed airspace could occur. Moreover, most of the cleared space—including the lower portion of the "glide path" involved here (see Pet. Br. 26a)—is not set aside for actual use; it is designed as a safety zone for emergencies, which normal flights will not invade. Finally, in point of fact, as the court itself emphasized, because of the other existing obstructions, "there had not been any actual encroachment upon * * * the air space over the land in question" (R. 216).

3. *The zoning power may properly be invoked to promote transportation by air*

Promotion of commerce by air is plainly a public purpose permitting ownership of airports. *E.g.*, *Griggs* v. *Allegheny County*, 369 U.S. 84. Implementation of that purpose by application of reasonable zoning limitations in the vicinity of such airports would seem to be equally an appropriate public activity. In holding that this may not be done, the Supreme Court of Indiana appears to have misunderstood the difference between regulation and a taking and the meaning of *United States* v. *Causby*, 328 U.S. 256, and the *Griggs* case.

Rejecting concepts of more extensive ownership, *Causby* held that ownership of real property includes ownership of "the immediate reaches of the superadjacent airspace" (328 U.S. at p. 266). But it does

not follow, as the Supreme Court of Indiana appears to have reasoned, that this right is absolute and is not subject to reasonable regulation in the public interest. The question here is not whether there would be a taking if aircraft flew at the level of the base of the glide angle. In this case there have been no flights and the court below held the ordinance void in its entirety. In *Causby* and *Griggs*, on the other hand, there was no zoning issue, for, there, aircraft had actually invaded the property of the landowner and interfered with its existing use. Whether the property right in airspace is subject to reasonable police power regulation was not before the Court in those cases.

This Court answered the basic question here presented almost 40 years ago in *Euclid* v. *Ambler Co.*, 272 U.S. 365, when it said concerning zoning laws (p. 387): "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." The law there involved, among other provisions, established height limitations ranging 35 to 80 feet (272 U.S. at 381). This Court said (p. 388):

> There is no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits, the character of materials and methods of construction, and the adjoining area which

> must be left open, in order to minimize the danger of fire or collapse, the evils of overcrowding, and the like, and excluding from residential sections offensive trades, industries and structures likely to create nuisances. See *Welch* v. *Swasey*, 214 U.S. 91; *Hadacheck* v. *Los Angeles*, 239 U.S. 394; *Reinman* v. *Little Rock*, 237 U.S. 171; *Cusack Co.* v. *City of Chicago*, 242 U.S. 526, 529–530.

The zoning power has been upheld, although it effectively barred a beneficial use to which property had previously been devoted. *Goldblatt* v. *Hempstead*, 369 U.S. 590. And prohibitions against use of particular portions of property have been sustained in *Gorieb* v. *Fox*, 274 U.S. 603, 608, the validity of regulations limiting "the extent of [the owner's] use of the space above his lot" being assumed. *Welch* v. *Swasey*, 214 U.S. 91; *Zahn* v. *Bd. of Public Works*, 274 U.S. 325. No distinction can reasonably be made in the present case because the zoning law is in aid of operation of the public airport. Indeed, the public interest here would seem to be more direct than the usual zoning controlling privately owned property.*

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*Recent periodical literature on this subject appears in Strunck, *Airport Zoning and Its Future* (1964), 50 A.B.A. Journal 345; Note, *Airport Zoning as a Height Restriction* (1962), 13 Hastings L.J. 397; Note, *Zoning—The Airport and the Land Surrounding it in the Jet Age* (1960), 48 Ky. L.J. 273; Pogue, *Legal Aspects of Planning for Urban Heliports* (1960), 46 Va. L. Rev. 84; Harvey, *Landowners' Rights in the Air Age: The Airport Dilemma* (1958), 56 Mich. L. Rev. 1313; Wolf, *Airport Approach Zoning—A Present Need* (1948), 17 Cincinnati L. Rev. 327.

4. The appropriate disposition of the case

All the parties in this Court seem to agree with the general principle just stated—that the federal Constitution does not prohibit reasonable airport zoning, even though it deprives the neighboring landowner without compensation of some part of the ordinarily usable airspace above his property. Respondent defends the judgment below only on the ground that, as applied to its road, the zoning ordinance effected an unconstitutional taking. While we acknowledge that there are circumstances in which regulation of land use amounts to a taking, we express no opinion whether that point has been reached here, because, as we have said, it is our view that the Indiana Supreme Court did not decide that narrow question. Nor do we think it appropriate to ask this Court to decide it in the first instance. Accordingly (unless the Court dismisses the writ for lack of jurisdiction), we submit that the judgment below, insofar as it erroneously resolves the broad federal constitutional issue, must be vacated, and that the case should

be remanded for consideration of the narrow question presented in the concrete context of this case, as well as the several State law issues that remain.[6]

Respectfully submitted.

ARCHIBALD COX,
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NOVEMBER 1964.

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[6] Among those are:

(1) Whether the zoning ordinance in suit was fully authorized by State law, a question expressly reserved by the opinion below (R. 210);

(2) Whether the ordinance, even if otherwise authorized, was intended to operate against another State agency possessed of the power of eminent domain (see R. 210);

(3) Whether the zoning ordinance grants rights to the plaintiffs such as to confer on them standing to maintain an action for damages;

(4) Whether the compromise entered into between the City of Gary and respondent, which apparently approved the present location of the toll road (see Respondent's Brief, pp. 55–56), does not preclude petitioners from claiming against the Commission (whatever their rights as against the City); and, finally,

(5) Whether the ordinance in suit—although it does not, on its face, offend the federal Constitution—falls under the Indiana Constitution.

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REPLY BRIEF FOR THE PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 60

NICK JESKOVICH AND PAUL JESKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET ASPHALTING COMPANY, *Petitioners*,

v.

INDIANA TOLL ROAD COMMISSION, *Respondent*.

On Writ of Certiorari to the Supreme Court of Indiana

REPLY BRIEF FOR PETITIONERS

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IN THE

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OCTOBER TERM, 1964

No. 60

NICK JANKOVICH AND PAUL JANKOVICH, CO-PARTNERS, DOING BUSINESS AS CALUMET AVIATION COMPANY, *Petitioners,*

v.

INDIANA TOLL ROAD COMMISSION, *Respondent.*

On Writ of Certiorari to the Supreme Court of Indiana

REPLY BRIEF FOR PETITIONERS

I. DEFENSE OF THE JUDGMENT UPON THE GROUND THAT THE ORDINANCE IN ITS SPECIFIC APPLICATION TO RESPONDENT'S PARTICULAR PROPERTY EFFECTUATES A TAKING IS PROCEDURALLY BARRED

Respondent's brief on the merits constitutes a confession of error. The sole ground upon which the judgment below rests is that the ordinance is a "wholly void" (R. 217) enactment "invalid as an entirety" (R. 214). Respondent does not even attempt to defend the judgment on this ground. It urges instead, as the exclusive basis for sustaining the judgment,

that the ordinance is invalid only in the special circumstances of its specific application to the respondent's particular property.[1] This is a brand new thought, with which the courts below were not favored, advanced for the first time before this Court. Until now the ordinance was never challenged as, and the court below never held that it was, arbitrary in the circumstances of its specific application. It was attacked as, and was held by the court to be, void on its face because it prescribed limitations on the use of property surrounding the airport. It was a blanket proscription of airport zoning which was sought and secured. Respondent thus retreats from a position it cannot hold to a position it cannot take.

A. The record as made is confined to an attack upon the ordinance on its face

As the court below observed (R. 210), the validity of the ordinance was first put in issue on an objection to its admissibility in evidence (R. 56). The ground of objection was altogether abstract, respondent urging that the ordinance was "defective, unenforceable, void and unconstitutional" in that (R. 56):

> . . . the attempt to establish glide angles or slopes in controlling the height of structures and objects near an airport by zoning is the unconstitutional taking of property without payment of compensation and is offensive to and violative of the 5th and 14th Amendments of the Constitution of the United States and Article 1, Section 21 of the Constitution of the State of Indiana;
>
> . . . the enactment of the purported airport zoning ordinance is an unlawful and unreasonable exercise of the police powers of the City of Gary,

[1] Res. br. pp. 1-2, 7, 8, 10-11, 15, 17, 18-19, 29-30, 31, 32-36.

> Indiana, in attempting, through zoning, to do that which must be done under the City's right of eminent domain. . . .

The objection was overruled and the ordinance admitted into evidence (R. 56-58). At this stage, on an objection to the admissibility of the ordinance into evidence, nothing but the validity of the ordinance on its face could have been put into issue. Authenticity aside, there is no way of excluding the ordinance from evidence except on a claim that it is a legal nullity. A claim of arbitrary application of the ordinance, as distinct from its invalidity on its face, would require rather than bar receipt of the ordinance into evidence.

The same abstract attack on the validity of the ordinance on its face was maintained throughout the proceeding after the admission of the ordinance into evidence. According to the court below, the "same issue was asserted as grounds for a motion for a finding for the defendant filed at the conclusion of the plaintiffs' evidence and after plaintiffs had rested their case, which motion was overruled" (R. 210). That motion, with no particularization of reasons, simply asked "the court to find for the defendant . . . and against the plaintiffs . . ." (Tr. 236-238, 240). After a judgment had been entered in petitioners' favor at the conclusion of the whole case, in a motion for a new trial, respondent *in haec verba* repeated the identical objection to the ordinance which it had expressed in seeking to exclude it from evidence (Tr. 254-257). No other constitutional objection to the ordinance was ever articulated at the *nisi prius* level. No evidence of arbitrary application was tendered. No such issue was tried.

On appeal, respondent again restricted its constitutional argument to the identical abstract attack upon

the validity of the ordinance on its face.[2] As it stated in its brief below, "The third reason for the invalidity of the ordinance is its unconstitutionality, *as urged by appellant in its objections to the admissibility of the ordinance and the maps or plans offered by appellees.* (Tr. pp. 622-625)."[3] Respondent thus recurred to the precise objection with which it had begun. And the exact judgment which the court below rendered in its favor was to direct the trial court "to sustain appellant's motion for a finding for defendant [appellant], which motion was filed at the conclusion of appellees' evidence" (R. 217). Thus, the motion to be sustained was a finding in favor of respondent at the close of petitioners' case *in advance of any possible evidence to be introduced by respondent of arbitrary application of the ordinance.* And the motion to be sustained, as read by the court below, asserted the "same issue" as had been originally raised by respondent's objection to the admissibility of the ordinance into evidence (R. 210).

The record as made, therefore, presents solely the issue of the validity of the ordinance on its face, with no possible question of specific application presented, preserved, or decided.

B. Under clear and settled Indiana law, in the absence of prior application for a variance, respondent was restricted to an attack upon the ordinance as void on its face in its entirety

Respondent's restriction of its attack upon the ordinance as void on its face in its entirety was neither inept nor inadvertent. The course it followed was required by utterly clear and settled Indiana law. Under

[2] Respondent's brief below pp. 238-243.

[3] *Id.* at 238, emphasis supplied.

that law, in the absence of prior application for a variance under the terms of the ordinance, the only judicial attack upon the zoning ordinance that an aggrieved property owner is free to make is that the ordinance is void as an entirety on its face.[4] In this case, since no variance had been sought, respondent had no alternative but to level its attack upon the ordinance as void in its entirety.

This is clear on the face of the opinion of the court below. As it states, "a variance need not be sought under the rule requiring exhaustion of administrative remedies when a zoning ordinance is invalid as an entirety. *Village of Euclid* v. *Ambler* (1926), 272 U.S. 365 . . .; 1 Metzenbaum, op. cit. *supra*, at 708" (R. 214). In *Euclid*, this Court held that, notwithstanding the failure to seek a building permit or apply to the zoning board of appeals for relief, an attack on the zoning ordinance was not premature because "the attack is directed not against any specific provision or provisions, but against the ordinance as an entirety." *Id.* at 386.[5] The distinction is put beyond doubt at the

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[4] *City of East Chicago* v. *Sinclair Refining Co.*, 232 Ind. 295, 111 N.E. 2d 459, reprinted *infra* pp. 1a-15a; *Indiana ex rel. City of South Bend* v. *Saint Joseph Superior Court*, 238 Ind. 88, 148 N.E. 2d 558, 560 (administrative remedy must be exhausted except where the attack made is that "the zoning ordinance was void in its entirety"); 1 Metzenbaum, Law of Zoning, 712, 727-728 (2d. 1955), explaining Indiana law. Indiana generally requires exhaustion of the administrative remedy as a precondition to judicial recourse. *State* v. *Rawlings*, 229 Ind. 552, 99 N.E. 2d 597, 600; *Illinois Central R. Co.* v. *Public Service Comm.*, 225 Ind. 643, 75 N.E. 2d 900, 903; *Hooser* v. *B. & O. R. Co.*, 279 F. 2d 197, 199 (C.A. 7) (". . . Indiana Courts have required exhaustion of administrative remedies prior to resorting to the Courts.").

[5] This is of course the general federal rule. *E.g.*, *Staub* v. *Baxley*, 355 U.S. 313, 319.

cited page of the Metzenbaum treatise to which the opinion below refers (emphasis in original):

> The usual requirement that a complainant must exhaust his available Administrative Remedies, before the courts will entertain such complainant's action, is divided—at the very outset—into *two*, dissimilar situations, to wit:
>
> (a) When a court-proceeding alleges that the zoning ordinance or regulation is unconstitutional in its *Entirety*, and that the very existence of "the ordinance and maintenance thereof, in effect, constitutes a present invasion of the complainant's property rights and a threat to continue it", and—on the other hand:
>
> (b) When the court action is aimed merely "against any *specific* provision or provisions" of a zoning ordinance, as they apply to complainant's particular property.
>
> In the former (a) instance—when a zoning ordinance is thus attacked in its *entirety*, it is *not* necessary to have employed the available administrative remedies, such as applying for a permit or going before the board of appeals, before entering court, or applying to the Legislative body.
>
> But, when a zoning ordinance, in the latter (b) situation, is attacked as to unconstitutionality or unreasonableness of a "*specific* provision" (or provisions) as it affects complainant's particular property, such complainant *is* required to employ the available *administrative* remedies, *before* the courts will entertain such action.

This distinction was a fully settled aspect of Indiana law at the time the instant action was instituted on July 26, 1956 (R. 1). The second edition of the Metzenbaum treatise cited by the court below, published in 1955, lists Indiana as an adherent of the distinction

and quotes its leading decision.[6] In 1953, in a lengthy consideration of the question, the Indiana Supreme Court confirmed its commitment to the distinction. *City of East Chicago* v. *Sinclair Refining Co.*, 232 Ind. 295, 111 N.E. 2d 459, reprinted *infra*, pp. 1a-15a. It observed that the "administrative procedure provided by the zoning statute and which must be followed before recourse to the courts may be had, insures the benefit of trained and experienced opinion and judgment in zoning matters applied to the facts of each particular case." 111 N.E. 2d at 467.

In short, in this case, the only attack on the ordinance that respondent was free to make was that it was invalid as an entirety. Its failure to invoke the remedies provided by the ordinance precluded any other course. It could not assail application without first having sought administrative relief.

C. In conformity with the record as made, and in keeping with Indiana law which restricted the issue to the validity of the ordinance in its entirety, the only decision rendered by the court below was that the ordinance was wholly void

In conformity with the single and limited issue tendered by the record as made, and in keeping with clear Indiana law which restricted the issue to whether the ordinance was a nullity on its face, the court below decided no question of application but confined its determination to the conclusion that the ordinance was a "wholly void" (R. 217) enactment "invalid as an entirety" (R. 214). No other issue was open. No question of application could have been decided.

The opinion below shows on its face that the court did not decide a different question from that which the

[6] 1 Metzenbaum, Law of Zoning, 712, 727-728 (2d ed. 1955).

record presented and Indiana procedure allowed. In describing the issue tendered the court below asked (R. 210):

> . . . does the ordinance purport to effect a taking of property for public use. . . .

In expressing the first branch of its conclusion, the court below stated (R. 213):

> . . . we conclude that the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation.

In expressing the second branch of its conclusion, the court below stated (R. 214, emphasis supplied):

> . . . it becomes apparent that the City of Gary has attempted, *by the passage of the ordinance under consideration,* to take and appropriate to its own use the ordinarily usable air space of property adjacent to the Gary airport without the payment of compensation.

In concluding that a variance need not have been sought, the court below stated (R. 214, emphasis supplied):

> . . . a variance need not be sought under the rule requiring exhaustion of administrative remedies when a zoning ordinance is *invalid as an entirety.*

In restating its ultimate conclusion, the court below declared (R. 216):

> . . . we conclude that the ordinance purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation.

And in concluding that compensation via inverse condemnation was not available, the court below stated (R. 217, emphasis supplied):

> . . . the ordinance, upon which appellees' alleged property right is based, was *wholly void* insofar as it purported to authorize the taking of private property without compensation therefor. Under these circumstances, as conceded by appellees in their brief, "If it [the ordinance] is *wholly void* then of course no rights are created thereby and it can be the basis for nothing and may be collaterally attacked."

Finally, corresponding with the language of the opinion, the record, and Indiana procedure, the plain import of the court's rationale limits the issue to the nullity of the ordinance as a whole. The entire thrust of the opinion is aimed at invalidation of airport zoning as such and not to the particularities of specific application. It is plain that, whether the height limitation is 18 feet, 28 feet, 58 feet, or 108 feet, the reach of the rationale is identical.

Thus, every route to the ascertainment of meaning—rationale, language, record, and procedure—arrives at the same destination. The sole issue presented or decided was the invalidity of the ordinance in its entirety on its face unrelated to any claim or finding of actual adverse application. In the light of this showing, the snips from sentences italicized by respondent do not present even a colorable contention that application of the ordinance is the issue. Res. br. pp. 32-34. Furthermore, contrary to respondent's contention that the mere presence of a severability clause in the ordinance shows of itself that only application can be at issue (res. br. p. 35), the severability clause is irrelevant in

view of the court's conclusion that the ordinance is invalid in its entirety. When the whole is invalid there is no occasion for separating the good from the bad.

D. This Court does not sit to review a different question than was pleaded, tried, appealed, or decided

Accordingly, as the only issue presented, preserved, or decided was the validity of the ordinance on its face unrelated to application, that is the only issue before this Court on the merits. This Court does not sit to adjudicate a question that was not pleaded, tried, appealed or decided. Since respondent does not even attempt to defend on the only ground open to it, it has in effect confessed error.

Respondent is therefore wide of the mark when it urges that, even if the court below determined only that the ordinance was invalid in its entirety, this Court should nevertheless decide "whether the ordinance is invalid as applied to the particular property here involved" (res. br. p. 32, n. 33). This Court does not affirm a judgment upon a ground that the record does not present or preserve.[7] Objections not "made . . . below . . . nor . . . discussed by any of the state courts . . . cannot . . . be urged here." *Van Huffel* v. *Harkelrode*, 284 U.S. 225, 229. "A judgment cannot be affirmed upon a ground not taken at the trial, unless it is made clear beyond doubt that this could not prejudice the rights of the plaintiff in error." *Peck* v. *Heurich*, 167 U.S. 624, 629; see also, *Indiana Farm-*

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[7] *Peck* v. *Heurich*, 167 U.S. 624, 629; *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U.S. 257; *Van Huffel* v. *Harkelrode*, 284 U.S. 225, 229; *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U.S. 268, 281; *Safeway Stores* v. *Oklahoma Retail Grocers Assn.*, 360 U.S. 334, 342, n. 7.

er's Guide Publishing Co. v. *Prairie Farmer Publishing Co.*, 293 U.S. 268, 281. There can hardly be anything more prejudicial than to be confronted for the first time in this Court with a claim that was not pleaded, tried, appealed or decided below. A question of application evokes uniquely a judgment based on a complex cluster of facts. To decide such a question without a trial addressed to that issue with particularity is to deny petitioners "their day in court; in other words, . . . equivalent to condemning them without affording them an opportunity to be heard." *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U.S. 257, 267.

Furthermore, respondent asks this Court to decide a question which the courts below would not entertain because procedurally barred by Indiana law. As we have seen (*supra*, pp. 5-7), in the absence of prior resort for administrative relief under the terms of the zoning ordinance, the Indiana courts will not adjudicate a claim based on application of the ordinance to particular property. Thus, since state procedure bars the issue, an independent and adequate state ground truly exists to preclude consideration by this Court of the question of application tendered by respondent.

Finally, equally mistaken is the suggestion of the United States that, upon vacation of the judgment following correction of the erroneous resolution of "the broad federal issue," the "ultimate question" of application should be remanded to the court below for consideration (br. pp. 2, 11-12). There is no "ultimate question" of application. That issue was injected into this case by respondent for the first time in this Court. The suggestion of the United States is incompatible

with the posture of this case and doubtless simply reflects a lack of familiarity with the record.[8]

II. ASSUMING THE QUESTION IS OPEN, THE RECORD FURNISHES NO BASIS FOR A TENABLE CLAIM THAT THE ORDINANCE EFFECTUATES A TAKING IN ITS SPECIFIC APPLICATION TO RESPONDENT'S PARTICULAR PROPERTY

As one means of demonstrating that the decision below rests on an abstract denunciation of airport zoning as such, the briefs of petitioners (pp. 47-48), the Attorney General of Indiana (pp. 38-41), and NIMLO (pp. 19-22) showed that the record was barren of any evidence which would support a reasoned conclusion that the ordinance effectuated a taking in the specific circumstances of its actual application to respondent's particular property. Respondent contends, however, that an 18-foot height limitation in a highly industrial area of itself suffices to establish a taking, implicitly excluding the relevance of any other factors from the judgment to be exercised (res. br. pp. 12-13, 42, 43-44, 47). Respondent's contention is virtually as abstract as the decision below.

1. Respondent's threshhold assertion of an 18-foot height limitation in a highly industrial area contains in itself exceedingly debatable factual issues.

(a) The land underlying the aerial approach to the north-south runway from the south—which is the area relevant to the issue of application that respondent

[8] The questions open on remand are accurately stated at p. 7, n. 9 of respondent's brief. They are not correctly stated at p. 12, n. 5 of the brief of the United States; question 3 has never been in issue, and question 5 presupposes the scope of this Court's decision under the Fourteenth Amendment and the Supremacy Clause.

asserts—is not industrialized at all. The Grand Calumet River is the boundary line dividing the southern part of the airport property from the toll road property. The toll road land to the south of the Grand Calumet River is marsh (R. 131). To the south of this marsh land is the track of the Chicago South Shore and South Bend Railroad, and the present distance between the river and the track is 411 feet (R. 131, 159, 185, pl. ex. 10, sheets 2 and 3, R. 56-58, 48). To the south of the track the area is residential (*ibid.*). An aerial photograph of the southern approach to the north-south runway shows that the land between the toll road and the track, as well as to the immediate south of the track, is undeveloped (R. 34-35, 183). It is the area to the east, north, and west of the airport, but not to the south, which is industrialized and zoned for that purpose (R. 130-131).

Accordingly, transposed to the factual situation which exists, respondent contends that an 18-foot height limitation on undeveloped marsh land abutting the river, with an additional 1-foot vertical allowance for each 40 horizontal feet from the river, is too restrictive because other unrelated areas are industrialized. Respondent would not even tolerate a setback from the water's edge. The Constitution enshrines no such absolutism.

(b) Nor is the relevant height limitation 18 feet. The toll road was not constructed on the river's edge. It was constructed partly on the river bed itself; the toll road shifted the river bed north a distance varying from 100 to 175 feet; at the point where the toll road intersected the aerial approach to the north-south runway, the north line of the river bed was moved across the existing south line of the airport property by 175

feet, approximately the width of the river (R. 53-54, 184-185). At the original south boundary of the airport, before the toll road moved the river bed north a distance of 175 feet, the permitted elevation of structures is 22.45 feet (pet. br. p. 8).

22.45 feet, not 18 feet, is thus the relevant height limitation, unless respondent can demonstrate the unreasonableness of an assumption by the lawmakers at the time the ordinance was enacted that (1) structures would not be erected on the river bed, or that (2) they are not constitutionally compelled to allow a river bed to be used for elevation of structures. But the record does not even show that respondent had obtained a property interest in the river when it acquired its right-of-way in 1954 and 1955 (R. 50, 58). The record does not show whether respondent's fee extends to the thread of the river, the water's edge, or the high or low-water mark. It surely does not show that, wherever the boundary is located, respondent was entitled to flood the land of the riparian owner on the opposite shore by diverting the flow of the river. There may be something unrevealed peculiar to the facts or the water law of Indiana which justifies respondent's action, but the record discloses nothing but a naked trespass. Accordingly, so far as the record shows, respondent's claim is unsupported by even the most absolutist notion of the attributes of property ownership.[9]

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[9] Respondent appears to begrudge the accuracy of our statement (pet. br. pp. 4, 7 and n. 3, 8, n. 4) that there exists 600 unconstructed feet, rather than 300 unconstructed feet, at the south end of the existing north-south runway (res. br. pp. 5, n. 6, 6, n. 8, 46). We would be delighted to assume 300 feet, for then respondent's position deteriorates even more. On the basis of 300 unconstructed feet, the actual permitted height of structures at the

2. The vulnerability of respondent's threshhold factual assertions is compounded by its disregard of other factors relevant to the issue of application. Thus:

(a) There is no showing that the toll road had to be built in the very place and at the very height selected or not at all, or that a shorter height and a more southerly route could not have been proportioned to each other to comply with the ordinance and suit the road about as well. On the other hand, the record shows positively that the airport's useableness was drastically impaired by the toll road. Since the burden of demonstrating unreasonable application rests upon respondent, its disregard of this element can only be justified by an assumption that in determining the reasonableness of zoning the effect of land use on neighboring property is irrelevant, and that it does not matter that solutions accommodating both property owners may be available. It need hardly be added that the assumption is at war with the premise underlying zoning.

(b) Assuming 18 feet is the relevant height limitation, and even disregarding the additional 1-foot elevation with each 40 feet of horizontal distance, the record does not show that this limitation deprived the property of beneficial use. The land is marsh, and so had little foreseeable intrinsic worth. Within its inherent limitations its probable useful purposes were unim-

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place of the toll road construction would be 25.6 feet, and at the original south boundary of the airport, before the toll road moved the river bed north a distance of 175 feet, the permitted elevation of structures would be 29.95 feet. Accordingly, on this assumption, as the toll road is built to a height of 29.8 feet, it could have been constructed at the original south boundary of the airport without violating the ordinance, so that the encroachment on the protected air space resulted from moving the south boundary northward a distance of 175 feet across the width of the river bed and locating the toll road at the new and nearer line.

paired. An allowable 18-foot elevation is ample for all one-story structures. Land with that height limitation is thus still useful for erection of low buildings, automobile parking, grazing, farming, storage, and many other purposes. As events happened to turn out possibly toll road construction was the best use to which the land could be put. But if "this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 592.

(c) Respondent acquired the property years after the ordinance was enacted and therefore with full notice of the limitations on its use. ". . . '[O]ne who purchases property with knowledge of the use restrictions thereon will generally not be permitted to claim special or unnecessary hardship . . .'" *Board of Zoning Appeals of City of Hammond* v. *Waskelo,* 240 Ind. 594, 168 N.E. 2d 72, 73. See also, 1 Metzenbaum, Law of Zoning, 802 (2d ed. 1955), and 1964 Supp. at 88-91.

3. Respondent's truncated approach is underscored by the standard expressed in section 14-422 of the Indiana Enabling Statute authorizing airport zoning (pet. br. p. 15a), and in section 6(1) of the CAA-NIMLO Model State Airport Zoning Act (res. br. p. 1a), both of which identically provide that:

> All airport zoning regulations adopted under this act shall be reasonable and none shall impose any requirement or restriction which is not reasonably necessary to effectuate the purposes of this act. In determining what regulations it may adopt, each municipality and joint airport zoning board shall consider, among other things, the character of the flying operations expected to be conducted

> at the airport, the nature of the terrain within the airport hazard area, the character of the neighborhood, and the uses to which the property to be zoned is put and adaptable.

The judgment called for is a sophisticated blend of many factors. Obviously no single element controls. Whatever the particular height limitation, standing alone it cannot be decisive. Height limits prescribed by airport zoning have been validated at 27.64 feet (*Harrell's Candy Kitchen, Inc.* v. *Sarasota-Manatee Airport Authority*, 111 So. 2d 439 (Fla.), 30 feet (*Waring* v. *Peterson*, 137 So. 2d 268 (Fla. Ct. App.), and 35 feet (*Baggett* v. *City of Montgomery*, 160 So. 2d 6 (Ala.)). This Court has validated a height limit of 35 feet as part of a comprehensive zoning plan. *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 381. There is no constitutional line between 18 feet, 22.45 feet, 27.64 feet, 30 feet, and 35 feet. 35 feet can be bad and 18 feet good, depending altogether on the cluster of other circumstances to which the specific height limit relates. Given nothing but a height limit, not enough appears to justify a judgment of invalidity.[10]

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[10] The FAA-recommended height limits, stressed by respondent (br. pp. 40-42), are of course not inconsistent with our thesis. The recommended limits are obviously designed to eliminate or at least minimize the risk of invalid application. The essence of cautious counseling is to stay wide of the dividing line when the dominating consideration is security from liability. But the line is well forward for those who wish to run the risk. In short, the FAA-recommended limit marks what is surely safe; it does not mark the constitutional minimum. No particular recommended height limit, however auspicious its sponsorship, has constitutional stature.

It should be noted that the regulation quoted at pp. 44-45 of respondent's brief has been superseded (27 Fed. Reg. 12349, December 13, 1962), and does not appear in the current codification of FAA regulations (14 CFR Part 151, as revised Jan. 1, 1964).

Accordingly, as in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 595-596, "A careful examination of the record reveals a dearth of relevant evidence"; "the evidence produced is clearly indecisive on . . . reasonableness"; respondent therefore failed to carry its "burden on 'reasonableness.'" And it is hardly surprising that the record is barren of evidence on the issue of invalid application. Respondent did not try that issue, and under Indiana law was precluded from trying it, having made no effort to exhaust its administrative remedy.

4. Evidently concerned that its position does not square with "the decisions relating to the validity of comprehensive zoning laws", respondent seeks to distinguish "between such laws and height limitations in airport zoning regulations . . ." (res. br. pp. 48-50). Its essential thesis is that an airport zoning height limitation confers an avigation easement authorizing overflights through the air space above the land. It does no such thing. Respondent falls into the same misreading of *Causby* and *Griggs* as the court below. As has been explained (pet. br. pp. 48-50; NIMLO br. pp. 11-19), a height limit does no more than keep the air space clear of obstructions. Airport zoning makes it possible for planes to operate safely. But airport zoning does not license any use, much less oppressive use of air space detrimental to the land owner below. If interfering overflights ensue, *Causby* and *Griggs* provide a remedy, and airport zoning provides no defense.

Airport zoning and comprehensive zoning cannot be distinguished. These two, like other refinements in zoning, are all in the end bottomed on the need for rea-

sonable adjustment of competing land use.[11] Airport zoning is indeed part of comprehensive zoning. As amended in 1964, Section 9(d)(1) of the Federal Airport Act requires, as a condition of approval by the FAA Administrator of a project or advance planning and engineering proposal, that the Administrator be "satisfied that the project or advance planning and engineering proposal is reasonably consistent with plans (existing at the time of approval of the project or advance planning engineering proposal) of public agencies for the development of the area in which the airport is located. . . ."[12] Explaining this amendment, the FAA Administrator stated that:[13]

> To assure that comprehensive planning for municipalities, and metropolitan and regional areas will take into account airport requirements, we have established a very close working relationship with the Housing and Home Finance Agency and its constituent units. Under section 701 of the Housing Act of 1954, the HHFA makes grants to eligible local agencies for comprehensive planning, including necessary planning for airports.
>
> A firm understanding has been reached within the executive branch that the planning grant-in-aid programs administered by the HHFA will be made available, whenever possible, to accomplish airport planning in connection with local comprehensive planning. The HHFA has issued instructions to its regional offices on the inclusion of airports in local comprehensive planning projects

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[11] See, generally, Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 64 Yale L.J. 1120 (1964).

[12] Public Law 88-280, § 8(c), March 11, 1964.

[13] Hearings before the Aviation Subcommittee of the Senate Commerce Committee on S. 1153, 88th Cong., 1st Sess., 13, 16 (1963).

> and inter-agency committees have been established at the regional levels to assure the integration of transportation planning.
>
> * * *
>
> . . . the provisions in the proposed bill make airport planning, you might say, subordinate to total regional and metropolitan planning and to the extent that airport development is inconsistent with such a plan, we are not able to proceed with a grant for expansion and construction purposes.

It is all one ball of wax.

III. RESPONDENT'S RELIANCE ON THE SETTLEMENT AGREEMENT BETWEEN IT AND GARY IS A COMPOUND OF IRRELEVANCE, INACCURACY, AND SPECULATION

In a variety of contexts, all irrelevant, respondent urges that its position is supported by a settlement agreement entered into between respondent and the City of Gary to resolve differences between them which had "finally resulted in an action being instituted by Gary against Commission . . ." (Def. ex. D; res. br. pp. 4, 51-52, 53-57). Consideration of respondent's contention requires a preliminary and accurate statement of what the record shows concerning this agreement.

1. The record shows, and only shows, the following:

(a) After petitioners had instituted their action against respondent, respondent moved the trial court for leave to file a third-party complaint against Gary, based on the settlement agreement, demanding judgment against Gary for all sums that may be adjudged against respondent and in favor of petitioners (Tr. 92-96). Gary demurred to the third-party complaint (Tr. 144-147), stating in part that (Tr. 145, ¶ 4):

> The settlement agreement between City of Gary and Indiana Toll Road Commission, attached as an exhibit to the "Third Party Complaint", expressly shows that it had to do only with the airport's northwest-southeast runway and had nothing to do with the airport's north-south runway, and plaintiffs' complaint counts only on alleged damage to them with respect to the north-south runway.

Gary's demurrer to the third-party complaint was sustained (Tr. 150), and judgment on the demurrer was rendered in favor of Gary and against respondent (Tr. 164). Respondent did not appeal.

(b) Respondent's answer to petitioners' complaint alleged that the settlement agreement was a bar to the action (R. 16-17 (¶ III), 18-19 (¶ V)). Petitioners demurred to this part of the answer (Tr. 162); the demurrer was sustained and respondent was given 20 days to plead over (Tr. 178); respondent filed an amended answer reasserting the settlement agreement as a bar (Tr. 179-182); petitioners moved to strike the amended answer relating to the settlement agreement (Tr. 212-214); the motion to strike was granted (Tr. 219).

(c) With the striking of respondent's answer pertaining to the settlement agreement, no issue concerning it was preserved for trial. At trial, respondent offered the settlement agreement into evidence, stating that its purpose was to show compliance by respondent with the Indiana Airport Enabling Act (Tr. 947).[14] In

[14] 5 Burns Ind. Stat. 14-417 provides in part that: "No state, county, city or other highway, road, street or other public way, no railroad, powerline, or other right of way of any kind or nature shall be laid out or opened across any airport or upon or in such

receiving the agreement in evidence, the trial court stated that (Tr. 948, emphasis supplied):

> I am going to let it go into evidence but only for the purpose of aiding the court to determine what the ultimate issues are, *but I can't see that this instrument is binding upon the plaintiffs in any way.*

(d) In view of the limited purpose for which the settlement agreement was received, respondent's present attempted use of it is altogether outside the scope of the issues that were tried. Furthermore, on the face of the agreement—and nothing else appears of record—nothing is disclosed which is germane. Part 2 of the agreement states that: "Subject to the modification and changes herein provided, the existing proposed route of Commission through Gary (as shown on Exhibit 1 attached hereto and made a part hereof) is approved." Exhibit 1, however, does not show that the proposed route corresponds with the toll road as actually constructed at the place and elevation that it intersects the aerial approach to the north-south runway. First of all, it does not show a proposed alteration of the original boundary between the airport and the toll road by shifting the river bed north by 175 feet over the existing south line of the airport property. Secondly, and conclusively, it shows nothing concerning the elevation of the road. It is not a con-

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proximity thereto as to affect the safe operation thereof without the approval of said board and council, both concurring." The settlement agreement was *not* approved by the Common Council of Gary, and the approval by the Gary Board of Aviation Commissioners was limited to a matter not presently germane (*infra*, pp. 23-24). Furthermore, the agreement did *not* approve the toll road construction at the place and elevation that it crossed the aerial approach to the north-south runway (*infra*, pp. 22-23).

tour map. It does not disclose elevation. And that is the critical point. For whatever the surface route of the road, it can comply with the ordinance so long as the elevation is maintained at the height limit prescribed by the ordinance. Since Exhibit 1 fails to show the elevation, the agreement cannot manifest approval of an unrevealed element. Indeed, despite earlier and persistent efforts to obtain accurate information, petitioners were unable to ascertain the elevation of the toll road until March 1956 when examination of a profile map secured by their engineers disclosed it (Tr. 753-757, 762-767; 1355-1359).

Finally, the agreement does not show approval of it by the Gary Board of Aviation Commissioners. While its president signed the agreement, the approval was in terms for a limited purpose. Part 17 of the agreement states that: "The parties signing this instrument, other than City of Gary by its Mayor, do so to evidence their consent to the taking by condemnation of such of their lands as will be necessary under the route attached as EXHIBIT 1." As recently as February 9, 1955, the President of the Board of Aviation Commissioners had said that he "wouldn't tolerate anything obstructing or causing a hazard to the use of either or both runways," and the Board "resolved to object to any construction or improvement of any kind by the Toll Road Commission that would in any manner create a hazard on any of our runways" (Tr. 1066, 1068, 1071); on August 10, 1955, after signing the agreement on August 4, the President informed the Board that he "was opposed to any obstruction that would in any way interfere with the operation of the airport" (Tr. 1060, 1059). As to Gary itself, its memo-

randum in support of the petition for certiorari states that (pp. 1-2):

> The decision below invalidates in toto the Airport Zoning Ordinance of the City of Gary. That ordinance was the governmental means chosen by Gary to protect safe and unobstructed approaches to the airport, to assure adjacent land use compatible with airport operations, and to serve these societal ends economically and with fairness to all. The decision below destroys the ordinance and precludes any recourse to airport zoning. It relegates Gary to financially prohibitive acquisition of property interests as the only way to protect its public airport. It outlaws airport zoning in reliance upon which existing investments were made and future improvements planned. It undercuts the main bulwark upon which Gary's participation in the National Airport Plan under the Federal Airport Act was predicated.

Finally, the settlement agreement was not signed by anyone on behalf of the Common Council of Gary, the body that enacted the ordinance.

2. Any tenable basis for respondent's reliance on the agreement is thus removed by the record itself.

(a) Based on the settlement agreement, respondent urges that "Until this lawsuit was instituted respondent had no reason to believe that there was any occasion for it to seek a variance" (res. br. p. 51). This is farfetched. The agreement did not approve the elevation of the road; it did not, and could not, repeal the ordinance and respondent's obligation to comply with it; it did not, and could not, bind petitioners; it therefore did not, and could not, provide any prudent basis for respondent's failure to seek a variance. Furthermore, prudent or not, failure to seek a variance was at its

own risk, not petitioners'. Finally, since it took institution of a lawsuit to get the agreement, and institution of a second lawsuit to attempt to secure compliance with the ordinance, it is fair to infer that respondent's *modus vivendi* was to act and let others sue. It is in no position to complain when suit succeeds in recalling to it the consequence of failure to observe obligations.

(b) Respondent contends that (1) petitioners' theory of action is that by the ordinance petitioners acquired an easement in the air space over the toll road property which the toll road construction infringed; (2) since the theory of action is premised on the acquisition of this easement, it follows of necessity that respondent is being subjected to an actual uncompensated appropriation of its property; and (3) the settlement agreement compelled this theory of action, for otherwise the agreement would have barred suit (res. br. pp. 53-57).

This is a breathtaking bit of verbal magic. But the facts stand in the way of the illusion. Nothing in the settlement agreement compels the theory of action that respondent imputes to petitioners. The agreement simply does not affect petitioners either in the subject that it covers or the parties that it binds. Respondent is thus at least twice removed from reality: it ascribes to the agreement a compulsion it does not have, and it ascribes to petitioners an apprehension they do not feel.

And the theory of action attributed to petitioners is newly discovered. Petitioners' theory was and is rather simple: the ordinance imposed an obligation on respondent; the injury to petitioners' leasehold that violation of the ordinance would cause gave petitioners

an enforceable interest in securing compliance with the ordinance;[15] and therefore violation of the ordinance, with resulting injury to petitioners, entitled them to injunctive relief and compensation for damages sustained by reason of respondent's breach. That is what the complaint stated (R. 8-9, ¶ 5-d). Respondent has not before had trouble understanding it. In the trial court, respondent stated that: "The essence of plaintiff's complaint is that defendant has violated an airport zoning ordinance respecting the minimum glide angle of aircraft utilizing the north-south runway of the Gary airport" (Tr. 153). In its brief below, respondent stated that the "rights asserted by appellees [petitioners] are based on the fact that they are lessees of a certain portion of the Gary Municipal Airport . . . Appellees contend that as such lessees they are entitled to compliance by appellant [respondent] with the terms of Ordinance No. 2897 . . ." (p. 231). And the court below summarized the action as one for damages to the leasehold resulting from violation of the ordinance (R. 208).

(c) Reliance on the settlement agreement is thus a huge red herring. It has nothing to do with the issue to be decided by this Court.

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[15] "The courts have been quite aggressive in permitting injured parties to avail themselves of the right to enter court for the purpose of enforcing their rights under zoning ordinances." 2 Metzenbaum, Law of Zoning, 1020 (2d ed. 1955). For an instance of implied power of private enforcement of a regulatory statute, see *J.I. Case Co.* v. *Borak*, 377 U.S. 426.

IV. THE DECISION BELOW DOES NOT REST UPON AN INDEPENDENT AND ADEQUATE STATE GROUND

Both respondent (br. pp. 24-30) and the United States (br. p. 2, n. 1) misunderstand, and therefore neither meets, the argument that the decision below conflicts with the Federal Airport Act. Lack of conflict is thought to follow from the premise that federal law does not prescribe airport zoning as the *sole* means of land use control to which state and local government *must exclusively* resort. Of course it does not. But that is not the point. Federal law prescribes airport zoning as a *principal and important* means of land use control to which state and local government *should significantly* resort. It is that predicate of federal law with which the total nullification of airport zoning worked by the decision below is in flat conflict. That acquisition of sufficient property interests is also important to complete airport planning, and that such acquisition is indeed an indispensable part of the total structure, does not detract from airport zoning as an independent and essential constituent of the scheme in its entirety. Walking is not the sole means of transportation but its elimination nonetheless conflicts with getting from one place to another.

It is beyond dispute that "adoption of zoning laws" by state and local government is central to the Federal Airport Act. That appears on the face of section 11(4) of the statute itself. Nor is the issue faced by describing the statutory scheme as "permissive." The so-called "permissive" means of securing recourse to airport zoning is to make resort to it a precondition to the grant of federal funds. When the realistic choice is between doing without an airport or an improvement to it, on the one hand, and compliance with federal con-

ditions to obtain financial aid essential to realization of the project, on the other, the actuality of federal prescription of standards can hardly be gainsaid. Congress had no doubt of the effectiveness of conditional grant of financial aid when it adopted it as its means of effectuating the National Airport Plan. ". . . [W]hen an airport qualifies for and receives Federal aid, it thereby gives up its purely local character and becomes a part of the national system of public airports. In becoming a part of the national system, some measure of local control must be given up. . . ." [16] Cooperative state-federal relations through participation in grant-in-aid programs is indeed an exemplar of contemporary federalism. A judicial decision which nullifies the federally-contemplated terms of the partnership destroys the federal plan.

This case vividly illustrates the conflict. Indiana through its enactment of the Airport Enabling Act and the Tall Structures Act, and its counties and municipalities through the adoption of local ordinances, have expressed the policy judgment of state and local government that there should be airport zoning (pet. br. pp. 35-38, 7a-15a; Atty. Gen. Ind. br., pp. 3-4 and nn. 1-3, 17-18). The precise condition that the Federal Airport Act is designed to realize for participation in the federal program is thus fulfilled. Entry into the state-federal partnership can be achieved. But the decision below frustrates the concord by its total nullification of airport zoning. Assuming that Article 1, Section 21 of the Indiana Constitution is the basis of decision, it simply provides that (R. 211, n. 1):

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[16] Bowers, *The Federal Viewpoint*, in *A Conference On Control And Protection of Airport Approaches*, 24 J. Air Law and Com. 170, 201 (1957).

> No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered.

Into this empty vessel, which on its face is divorced from the slightest governmental consideration of airport zoning either pro or con, the court below pours absolute prohibition of airport zoning. This ban is judicially-evolved in whole; it does not express but repudiates state governmental policy on airport zoning. It would therefore be fictive to take the decision below as an exercise of the State's option to decline as a matter of governmental policy to utilize airport zoning; it is rather a judicial determination that regardless of the legislatively-expressed governmental policy in favor of it airport zoning is constitutionally barred as inherently incompatible with property ownership. That determination collides with the Federal Airport Act.

Part of respondent's misconception derives from its treatment of the decision below as invalidation of a particular application of the ordinance instead of total voidance. Granted the general validity of airport zoning, whether a particular application is a taking rather than regulation will rarely generate a conflict question.* But the total invalidation of airport zoning, evolved as a judicial ban drawing on due process conceptions in repudiation of federal, state and local governmental policy in favor of it, inescapably collides with the Federal Airport Act.

Intelligent consideration of the validity of airport zoning is impossible without a full probe of the federal

role. An informed determination is literally dependent on a right reading of the federal law. The court below sensed that clearly. It was mistaken about, but not indifferent to, the import of federal activity (R. 216). Erroneously but ineradicably, *Causby* and *Griggs* are the bases of the court's decision (R. 212-213, 214). Substitute a right comprehension of the federal scheme and a right reading of *Causby* and *Griggs*, and the result below could remain the same only if reason is not relevant to adjudication. How can a ground of decision be independent of federal law when it is premised on it? And if independent, how can it be adequate, if the result is incompatible with federal law? The problem is simply too involved in federal law to be sensibly dissociated from it.

Respectfully submitted,

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APPENDIX

CITY OF EAST CHICAGO, IND.

v.

SINCLAIR REFINING CO.

232 Ind. 295, 111 N.E.2d 459

No. 28794

SUPREME COURT OF INDIANA

March 27, 1953

BOBBITT, Judge.

Appellee has continuously, since the year 1916, owned and operated within the limits of appellant city an industrial plant for the manufacture and refining of petroleum products. In September of 1919 appellee purchased additional land adjacent to its plant and referred to in the complant herein as Parcel No. 1 containing 8.118 acres, and Parcel No. 2 containing 24.244 acres, for the sole and only purpose of industrial use in connection with the development and expansion of its industrial plant. The exact location of said Parcels 1 and 2 in relation to surrounding property is best shown by appellee's (plaintiff's) Exhibit 21, which is an aerial photograph of the two parcels of land and abutting and surrounding lands and buildings.

On December 26, 1929 appellant city adopted a zoning ordinance which, by its provisions, classified appellee's Parcel No. 1 for light industrial use and Parcel No. 2 for single-family dwellings. This ordinance was amended in November of 1946 and by this amendment the use classification of Parcel No. 2 was changed from one-family dwellings to two-family dwellings.

Appellee made no effert to use said land until 1945 when it requested of appellant that the restrictions on Parcel No. 2 be changed so as to permit the construction of laboratory buildings, which request was denied. Appellee now desires to erect and construct tanks for the storage of petroleum products on Parcel No. 2, and either such tanks or a railway car and equipment repair shop on Parcel No. 1.

It instituted this action for declaratory judgment to determine the force and effect, if any, of said amendatory zoning ordinance as it relates to the rights of appellee in and to the use of said two parcels of land.

Trial was by the court. Special findings of fact and conclusions of law were requested. Upon the facts specially found the trial court concluded that said ordinance "insofar as it restricts the use" of the two parcels described in the complaint was void because it violated Art. 1 Sec. 21 of the Constitution of Indiana, and Sec. 1 of the Fourteenth Amendment to the Constitution of the United States, that it was without regard to public health, safety, morals and general welfare insofar as it restricted the use of appellee's two parcels of land, and that said ordinance was not enacted for any of the purposes set out in the statute and was unreasonable insofar as it restricted the use of the two parcels of land to the uses therein defined because "said lands are best suited for heavy industrial use". Judgment was entered declaring the ordinance "void and of no force and effect insofar as the same effects the use for other than heavy industrial purposes of the plaintiff's [appellee's] land," as described in the complaint.

The sole error here assigned is the overruling of appellant's motion for a new trial. This motion contains thirty-two separate specifications, the first of which is as follows:

> "1. The court erred in overruling the defendant's motion for a finding filed at the close of the plaintiff's

evidence, which motion was in words and figures as follows, to-wit:

"'At the close of plaintiff's case, and without prejudice to the right of the defendant to offer and introduce evidence in defense thereof, the defendant moves that the court make and enter a finding for the defendant for each of the following reasons, to-wit:

"'1. The plaintiff has not offered any evidence sufficient to sustain a right to a declaratory judgment;

"'2. The plaintiff has not offered any evidence sufficient to establish this cause;

"'3. The plaintiff, by its chief executive officer appearing in this cause has admitted that plaintiff seeks only a re-classification of the zoning of its property and has not proved that any petition for relief from the terms of Ordinance number 2449 as set forth in the complaint herein was filed with or presented to the Board of Zoning Appeals of the defendant city;

"'4. The plaintiff has not offered sufficient evidence to sustain any allegation of general invalidity of said ordinance 2449 and has not proved that any petition for relief from the classification, zoning, and/or restrictions of said ordinance in regard to the property described in plaintiff's complaint was presented to or filed with the Board of Zoning Appeals of the defendant city; * * *.'"

This motion raised a question of the jurisdiction of the subject matter of the particular case, which was not waived by the subsequent presentation of evidence by appellant (defendant).

Twelve other reasons are stated in support of the motion, but in view of the conclusion which we have reached we shall confine ourselves to a consideration only of the ones quoted above.

Appellant contends that since appellee sought only to have said ordinance declared unconstitutional and void as it affected and applied to its two parcels of land, it should have pursued and exhausted the administrative remedy provided by statute and the ordinance before seeking a determination of its rights in the courts.

Appellee contends that where the factual situation discloses that there has been a violation of constitutional rights, or that the exercise of the police power is clearly unreasonable, or where it is clearly shown that there is no real relation between the ordinance and its professed object, resort may be had to the courts to test the validity of the ordinance as it applies to one or more parcels of land, without first exhausting any administrative remedies which may be available and adequate.

Appellant relies upon City of South Bend v. Marckle, 1939, 215 Ind. 74, 18 N.E.2d 764, to support its position. That was also an action for a declaratory judgment seeking to declare a zoning ordinance of the city of South Bend, Indiana, unconstitutional insofar as it restricted or related to appellees' real estate. Appellees there sought to use certain real estate which was zoned for residential use for the purpose of building a filling station thereon or, in the alternative, to sell said property to a purchaser to be used for commercial purposes. The complaint inter alia alleged that the real estate was not suited for residential purposes and that its value for commercial use would be four to six times greater than for residential use; and that the ordinance constituted a taking of appellees' property without just compensation in violation of section 21 of article 1 of the Indiana Constitution, and the Fourteenth Amendment to the Constitution of the United States.

The overruling of appellants' demurrer in the Marckle case was assigned as an independent error. The memorandum accompanying the demurrer asserted that the complaint was bad because it failed to show that any appeal

was taken to the Board of Zoning Appeals or that certiorari was requested of the Circuit Court.

This court, at pages 82, 83 of 215 Ind., at page 767 of 18 N.E.2d, said:

> "Summarizing the opinions of the Appellate Court in the Ostrom[1] and O'Connor[2] cases and in the Waintrup[3] case, as herein distinguished, supra, we find that they are authority for the following rules: (1) A court will not review any exercise of the discretionary powers of a board of zoning appeals unless, of course, there is a clear abuse of discretion; (2) an appeal to the circuit court by way of certiorari is authorized when the board has acted illegally, and this is true even though the illegality arises out of a violation of the petitioner's constitutional rights, so long as it is not claimed that the entire zoning ordinance is invalid; and (3) where it is claimed that the entire zoning ordinance is void the remedy is not by resort to certiorari, but may be asserted by direct action. Applying the rules stated, it is apparent that the appellees have misconceived their remedy. They are not concerned with a modification of the terms of the ordinance as they apply to the district in which their properties are situated, so there was no occasion for them to ask an amendment thereof by the common council. They claim only that the ordinance, in its application to them, is unreasonable, in that the classification of their real estate for residential rather than commercial uses, deprives them of valuable property rights without due process or just compensation. Their properties are

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[1] Civil City of Indianapolis v. Ostrom Realty, etc., Co., 1932, 95 Ind. App. 376, 176 N.E. 246.

[2] O'Connor v. Overall Laundry, Inc., 1934, 98 Ind. App. 29, 183 N.E. 134.

[3] Board of Zoning Appeals of the City of Indianapolis v. Waintrup, 1935, 99 Ind. App. 576, 193 N.E. 701.

shown to be located at the boundary of a zone district. Their case comes within the terms of that part of section 48-2304 Burns 1933, § 11657 Baldwin's 1934, which authorizes the board of zoning appeals to adjust conditions so as to prevent unnecessary hardships. Their complaint should have been directed, in the first instance, to the board of zoning appeals, and if that did not avail, they should have asked a review in the circuit court by way of certiorari."

We think the rules asserted by this court in City of South Bend v. Marckle, 1939, 215 Ind. 74, 18 N.E.2d 764, supra, are sound and in keeping with the recognized orderly procedure in the law of zoning.

Acts 1947, ch. 174, § 77, p. 571, § 53-778, Burns' 1951 Replacement, provides:

"The board of zoning appeals shall:

"1. Hear and determine appeals from and review any order, requirement, decision or determination made by an administrative official or board charged with the enforcement of any ordinance or regulation adopted pursuant to sections 56 through 65 (§§ 53-756—53-766) of this act.

"2. Permit and authorize exceptions to the district regulations only in the classes of cases or in particular situations as specified in the ordinance.

"3. Hear and decide special exceptions to the terms of the ordinance upon which the board is required to act under the ordinance.

"4. Authorize upon appeal in specific cases such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary

hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.

Ordinance No. 2449 of the City of East Chicago, adopted December 26, 1929, provides:

"Article XIV

"Board of Zoning Appeals

* * * * * * * * *

"Section 3. The Board of Zoning Appeals shall have the following powers and it shall be its duty:

"1. To hear and decide appeals where it is alleged there is error of law in any order, requirement, decision or determination made by the Building Commissioner in the enforcement of this Ordinance.

* * * * * * * * *

"4. To grant a variation in the regulations when a property owner can show that his property was acquired in good faith and where by reason of exceptional narrowness, shallowness, or shape, of a specific piece of property at the time of the effective date of this Ordinance, or where by reason of exceptional topographical conditions or other extraordinary or exceptional situations, the strict application of the terms of this Ordinance actually prohibits or unreasonably restricts the use of his property, and where the Board is satisfied, under the evidence heard before it, that the granting of such variation will alleviate a clearly demonstrable hardship approaching confiscation, as distinguished from a special privilege or convenience sought by the owner; provided, however, that all variations granted under this clause shall be in harmony with the intended spirit and purpose of said Ordinance and shall not constitute a direct and obvious amendment of any district regulations or district boundaries.

* * * * * * * * *

"Section 5. Any person or persons, firm or corporation, dissatisfied with the decision and action of the Board of Zoning Appeals may present to the Circuit or Superior Court of Lake County a petition for a writ of certiorari. The procedure for making such appeal shall conform to the requirements of the laws of the State of Indiana authorizing cities to adopt zoning regulations."

Both the statute and the ordinance here involved provide an administrative remedy for persons whose property is unreasonably restricted by the terms of the ordinance or where, owing to special conditions, a literal enforcement of the ordinance will result in unnecessary hardship.

Where, as here, an administrative remedy is provided, it must be exhausted before judicial review may be requested. Marion Trucking Co. v. McDaniel Freight Lines, 1952, Ind. Sup., 108 N.E. 2d 884, 885; State ex rel. Evansville, etc. Lines v. Rawlings, 1951, 229 Ind. 552, 559, 99 N.E. 2d 597; Myers v. Bethlehem Shipbldg. Corp., 1938, 303 U.S. 41, 82 L. Ed. 638, 644, 58 S. Ct. 459; Stark v. Christie, 1941, 179 Md. 276, 19 A. 2d 716, 719; Sacer Realty Corporation v. Archer, 1946, 68 N.Y.S. 2d 277, 279; Glencoe Lime & Cement Co. v. City of St. Louis, 1937, 341 Mo. 689, 108 S.W. 2d 143, 144; Davis—Administrative Law, Primary Jurisdiction, § 197, p. 664; Conclusions, § 198, p. 673.

Appellee asserts that the holding of the Appellate Court in Civil City of Indianapolis v. Ostrom Realty, etc., Co., 1932, 95 Ind. App. 376, 176 N.E. 246, supra, precludes its use of the administrative remedy in the case at bar, because of the area of the parcels of ground involved.

In that case the Board of Zoning Appeals attempted, upon its own motion, when no petition for variance or any appeal from any officer or board was pending before it, to reclassify and rezone six separate lots, comprising an entire city block. The Appellate Court there correctly held that

the Board had no authority to act in the absence of an appeal from an administrative officer or board charged with the enforcement of the ordinance. The court further held that an attempt to amend or change a whole city block without an ordinance by the common council was not contemplated by the act then in force, and such action was, therefore, void.

We approve the rule that a Board of Zoning Appeals has no authority to act unless its authority to do so has been legally invoked. However, we do not believe that the language used by Judge Kime in the Ostrom case to the effect that a Board of Zoning Appeals cannot, under the guise of a variance, reclassify an entire city block, can be adopted and used as a general rule or measuring stick, to be arbitrarily applied in every case and under all circumstances and conditions, for the purpose of determining what size tract or parcel of land may be considered by the Board of Zoning Appeals under the hardship provisions of the ordinance, or to determine at what particular point it becomes a matter for amendment of the ordinance by the common council.

Each zoning case must be decided upon its own factual situation. Potts v. Board of Adjustment, 1945, 133 N.J.L. 230, 43 A. 2d 850, 854; Smith v. Board of Appeals of Fall River, 1946, 319 Mass. 341, 65 N.E. 2d 547; Application of Devereux Foundation, 1945, 351 Pa. 478, 41 A. 2d 744, 746; Arditi Realty Co. v. Murdock, 1946, Sup., 67 N.Y.S. 2d 809.

The application of the unnecessary hardship doctrine is not governed solely by the size of the area or the particular piece of property upon which the unnecessary hardship is imposed. No single factor determines what constitutes unnecessary hardship, but all relevant factors, when taken together, must indicate that the special conditions are such that the property affected cannot reasonably be put to a conforming use because of the limitation imposed upon it by reason of the classification in which it is placed by the

terms of the ordinance. Brackett v. Board of Appeal of Building Department, 1942, 311 Mass. 52, 39 N.E. 2d 956; St. Onge v. City of Concord, 1949, 95 N.H. 306, 63 A. 2d 221, 223; Heffernan v. Zoning Board of Review, 1929, 50 R.I. 26, 144 A. 674, 676.

The conditions necessary to establish "unnecessary hardship" were concisely stated in Otto v. Steinhilber, 1939, 282 N.Y. 71, 24 N.E. 2d 851, at page 853:

> "Before the Board may exercise its discretion and grant a variance upon the ground of unnecessary hardship, the record must show that (1) the land in question cannot yield a reasonable return if used only for a purpose allowed in that zone; (2) that the plight of the owner is due to unique circumstances and not to the general conditions in the neighborhood which may reflect the unreasonableness of the zoning ordinance itself; and (3) that the use to be authorized by the variance will not alter the essential character of the locality."

See also: Calcagno v. Town Board, 1943, 265 App. Div. 687, 41 N.Y.S. 2d 140, affirmed 291 N.Y. 701, 52 N.E. 2d 592; Court Boulevard v. Board of Standards & Appeals, Sup., 1947, 72 N.Y.S. 2d 753.

We approve the rules above stated. In view of appellee's position that the land here in question cannot be made the subject of a variance because of its area, it may be pointed out that the above rules make no reference to the area or size of the property which may be considered in a variation of the ordinance on the ground of unnecessary hardship.

Courts cannot rezone property. Neither can they lay down any general rule defining the area or size of a particular piece of property which a Board of Zoning Appeals may consider under the unnecessary hardship rule. Each case must be determined on its own merits.

The Board of Zoning Appeals is authorized by statute to grant variances from the terms of the ordinance where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in unnecessary hardship, so long as such action is not contrary to the public interest and the spirit of the ordinance is preserved and substantial justice is done. Whether or not an unnecessary hardship exists is a question of fact to be determined by the Board of Zoning Appeals. Board of Zoning Appeals v. Moyer, 1940, 108 Ind. App. 198, 27 N.E. 2d 905; Keeling v. Board of Zoning Appeals, 1947, 117 Ind. App. 314, 69 N.E. 2d 613.

When a Board of Zoning Appeals grants a variance from the provisions of an ordinance, it merely varies the use to which a certain particular piece of property may be put—it does not rezone the land covered by the variance. In Indiana the power to rezone is vested in the Common Council.

Appellee asserts that City of South Bend v. Marckle, 1939, 215 Ind. 74, 18 N.E. 2d 764, supra, is in conflict with the holding of the United States Supreme Court in Euclid, Ohio v. Ambler Realty Co., 1926, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 54 A.L.R. 1016, upon which it relies, because the overruling by the trial court of a motion to dismiss on the ground that appellee had made no effort to obtain a building permit or apply to the Board of Zoning Appeals for relief and, therefore, the suit was premature, was sustained. That was a suit to enjoin the enforcement of a zoning ordinance and all attempts to impose *any* of the restrictions, limitations or conditions thereof as to appellee's property.

The attack there was directed "not against any specific provision or provisions, but against the ordinance as an entirety." While in the Marckle case appellees sought, in an action for declaratory judgment, to have the ordinance declared unconstitutional only insofar as it restricted or

related to the use of their real estate, and it was not claimed that the entire ordinance was invalid.

These cases are clearly distinguishable. The Marckle case falls within rule 2 as stated by this court in City of South Bend v. Marckle, 1939, 215 Ind. 74, 82, 18 N.E. 2d 764, supra, while the Euclid case clearly falls within rule 3.

Appellee further relies upon Nectow v. City of Cambridge, 1928, 48 S. Ct. 447, 277 U.S. 183, 72 L. Ed. 842, where an ordinance of the City of Cambridge, Massachusetts, was directly attacked under circumstances and for the same reasons as are present in the case at bar. However, in that case the question of the failure of the appellant to exhaust the administrative remedy provided, if any, (no mention of such is made in the opinion) before resorting to court action, was not raised. Hence it is not authority for declining to pursue and exhaust the administrative remedy available to appellee herein.

Appellee cites a number of cases in support of its alleged right to follow the method of procedure which it has elected to pursue herein. Without unnecessarily extending this opinion by a discussion of these authorities, we believe it sufficient to note that in some of them the question of remedy was not an issue, in others the attack was upon the ordinance as a whole, while others are distinguishable because of the factual situations upon which the decision rests.

In some jurisdictions resort may, under certain circumstances, be had to the courts for a direct attack upon a Zoning Ordinance because of its effect on a particular piece of property without first exhausting any available administrative remedy. However, the factual situation here does not present such a set of circumstances.

The case at bar falls clearly within City of South Bend v. Marckle, 1939, 215 Ind. 74, 18 N.E. 2d 764, supra. As we have said, that was an action for a declaratory judgment to declare the South Bend Zoning Ordinance unconstitu-

tional and void insofar as it restricted or related to the use of three contiguous lots owned by appellees. There, as here, appellees sought only to use their property for a purpose different from the use classification imposed upon it by the ordinance. They alleged, as does appellee herein, that their real estate was not suitable for residential purposes, and that it would be worth several times as much for business purposes; and that the ordinance constituted a taking of their property without just compensation.

The prayer for relief in the Marckle case was that the ordinance be declared unconstitutional insofar as it restricted or related to appellees' (Marckle and others) real estate, while in the case at bar appellee seeks a determination of the force and effect of the ordinance and, if any, its effect upon the use of said parcels 1 and 2 as described in the complaint. The end result sought is the same in both cases. The fact that one case involved three contiguous lots, the dimensions of which are not mentioned in the opinion, and the other involves two undeveloped parcels of land containing 8.118 and 24.244 acres, respectively, does not, under the issues here involved, distinguish one case from the other as a matter of principle.

Insofar as City of Indianapolis v. 'Ostrom Realty, etc., Co., 1932, 95 Ind. App. 376, 176 N.E. 246, supra, proposes to restrict the area which may be considered by a Board of Zoning Appeals under the unnecessary hardship rule, it is limited to the particular circumstances of that case.

The factual situation here brings appellee's case within the provisions of § 77, of ch. 174, Acts 1947, being § 53-778, Burns' 1951 Replacement, supra, which authorizes the Board of Zoning Appeals to vary a zoning ordinance to prevent unnecessary hardships which, by the provision of the ordinance, may be imposed upon a particular property.

In seeking a variance, under the circumstances herein, appellee should have applied to the building commissioner

for a permit and, if denied, then an appeal from the order of denial should have been prosecuted to the Board of Zoning Appeals and, if dissatisfied with the decision of this Board, then it should have pursued the administrative remedy further by petition for writ of certiorari to the Circuit or Superior Court setting forth, as provided by statute, that the decision of the board was illegal, in whole or in part, and specifying the ground of the illegality. If the order complained of amounted to an invasion of appellee's constitutional rights this question could have been determined by the court on the petition for certiorari, so long as it was not claimed that the entire ordinance was void. City of South Bend v. Marckle, 1939, 215 Ind. 74, 18 N.E. 2d 764, supra; People v. Calvar Corp., 1941, 286 N.Y. 419, 36 N.E. 2d 644, 136 A.L.R. 1376, Id., Co. Ct., 69 N.Y.S. 2d 272; Goodwin v. City of Louisville, 1948, 309 Ky. 11, 215 S.W. 2d 557; City of Little Rock v. Hunter, 1950, 216 Ark. 916, 228 S.W. 2d 58; Applestein v. City of Baltimore, 1928, 156 Md. 40, 143 A. 666; Park Ridge Fuel & Material Co. v. City of Park Ridge, 1929, 335 Ill. 509, 167 N.E. 119; State v. Roberson, 1929, 198 N.C. 70, 150 S.E. 674; Caulwal Const. Co. v. Burwell, 1930, 136 Misc. 259, 240 N.Y.S. 456; Towers Management Corporation v. Thatcher, 1936, 271 N.Y. 94, 2 N.E. 2d 273; Payne v. Borough of Sea Bright, 1936, 14 N.J. Misc. 756, 187 A. 627; Provo City v. Claudin, 1936, 91 Utah 60, 63 P. 2d 570; Home Fuel Oil Co. v. Borough of Glen Rock, 1937, 118 N.J.L. 340, 192 A. 516; Glencoe Lime & Cement Co. v. City of St. Louis, 1937, 341 Mo. 689, 108 S.W. 2d 143, supra; Washington v. City of Dallas, 1942, Tex. Civ. App., 159 S.W. 2d 579; Kahl v. Consolidated Gas, Electric Light & Power Co., 191 Md. 249, 60 A. 2d 754; S. S. Kresge Co. v. City of New York, 1949, 194 Misc. 645, 87 N.Y.S. 2d 313, affirmed 275 App. Div. 1036, 92 N.Y.S. 2d 414; Cleveland Trust Co. v. Village of Brooklyn, 1952, 92 Ohio App. 351, 110 N.E. 2d 440, 448.

The administrative procedure provided by the zoning statute and which must be followed before recourse to the

courts may be had, insures the benefit of trained and experienced opinion and judgment in zoning matters applied to the facts of each particular case. The Board of Zoning Appeals is not limited to an affirmance or reversal of the action of the building commissioner or other administrative officer charged with the enforcement of the ordinance, but may use its judgment and discretion in making such modification of the official's order and attach such conditions and restrictions to the granting of a variance as in its opinion should be made, so that the spirit of the ordinance shall be observed and substantial justice done.

Appellee might also have had relief from its alleged unnecessary hardship by seeking an amendment to the zoning ordinance in the manner provided by Art. 14 thereof. Either of these remedies might have furnished appellee, without resort to the courts, the relief which it is seeking.

For the foregoing reasons the judgment of the trial court is reversed with instructions to sustain appellant's motion for a finding for the defendant at the close of plaintiff's evidence, and for further proceedings not inconsistent with this opinion.[1]

Judgment reversed.

[1] Rule 2-6 as amended Nov. 30, 1949.